No. 20063

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HOLLAND BULB IMPORTERS, INC.,

Bankrupt.

WILLIAM N. BOWIE, JR., Trustee,

Appellee,

vs.

A & E PLASTIK PAK CO., INC.,

Appellant.

APPELLEE'S BRIEF

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Appellant.

APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

The facts are undisputed. The Trustee in Bankruptcy filed an Application for Stay of State Court proceedings, Restraining Order and Order to Show Cause to prohibit A & E PLASTIK PAK CO., INC., its agents or employees, from prosecuting a State Court action against HOLLAND BULB IMPORTERS, INC., prohibiting the Marshal of the

County of Los Angeles from disbursing any money or property under attachment to said creditor, and ordering the Security First National Bank to surrender to the Trustee any monies or properties held under any levies by said creditor.

A & E PLASTIK PAK CO., INC., is a California corporation and a general creditor of HOLLAND BULB IMPORTERS, INC., the above entitled Bankrupt. On December 11, 1962, said creditor filed a suit in the Municipal Court of Los Angeles Judicial District in Los Angeles, California, against the Bankrupt herein and others, being Case No. 948,190 and captioned "Complaint for Money."

On December 12, 1962, the Los Angeles County Marshal levied a Writ of Attachment on Security First National Bank, pursuant to said litigation hereinabove referred to, and on December 13, 1962, the Bank made a "not indebted" return of said attachment.

Thereafter, A & E PLASTIK PAK CO., INC., caused proceedings to be had against the Bank pursuant to California Code of Civil Procedure, Section 545, and on January 30, 1963, the Bank made. issued and delivered an amended return to said Writ of Attachment stating that said Bank was holding under and in response to the said Writ of Attachment, the balance of Account No. 078,675, in the name of HOLLAND BULB IMPORTERS, INC., the sum of $2,579.02.

A trial in the Municipal Court of Los Angeles Judicial District in Case No. 948.190 has not as yet been heard, nor has a judgment been obtained in said proceedings.

An Involuntary Petition in Bankruptcy was filed by Creditors against the Bankrupt herein in the United States District Court, Southern District of California, Central Division, on November 18, 1963, and HOLLAND BULB

IMPORTERS, INC., was adjudged a Bankrupt on December 13, 1963. On April 1, 1964, WILLIAM N. BOWIE, Jr., was duly appointed and qualified as Trustee of said Bankrupt Estate and ever since the said date, he has been and is the acting and qualified Trustee of said Bankrupt Estate.

The Trustee, herein, claimed that the Attachment lien obtained by A & E PLASTIK PAK CO., INC., under the laws of the State of California, is and was contingent and inchoate, and is merely a "Lis Pendens" notice that a right to perfect a lien exists. The Trustee further claimed that due to the fact that no judgment has been obtained by said creditor prior to the filing of the Petition in Bankruptcy on November 18, 1963, no transfer of the property of the Bankrupt to said creditor occurred, and that under Section 70(a) of the Bankruptcy Act, title to the Bankrupt's property vested in the Trustee on said date.

The debt arising from the debtor-creditor relationship herein referred to, between the bankrupt and A & E PLASTIK PAK CO., INC., is the type of debt dischargeable in Bankruptcy. Neither the creditor nor the Bank objected to the Court's summary jurisdiction in this proceeding.

The Honorable Norman W. Neukom, Referee in Bankruptcy, in his findings of fact and conclusions of law, after having reviewed both oral and written arguments of all parties hereto, ruled that the attachment lien obtained by A & E PLASTIK PAK CO., INC., is and was contingent and inchoate and is merely a Lis Pendens notice that a right to perfect a lien exists. The Bankruptcy Court further felt that it was bound by the holding of the Ninth Circuit Court in the case of *Rialto Publishing Company v. Bass*, 325 F.2d 527, C.C.A. 9th (1963), where it was

held that no transfer occurred until such time as the creditor obtained its judgment and levied execution thereon.

The Bankruptcy Court thereupon granted the Trustee a Restraining Order against A & E PLASTIK PAK CO., INC., from proceeding against the attached funds of HOLLAND BULB IMPORTERS, INC., in said State Court action, and the Court further restrained said creditor from proceeding against any monies which may be held by the Security First National Bank under said amended return to a Writ of Attachment dated January 30, 1963.

On November 4, 1964, A & E PLASTIK PAK CO., INC., feeling aggrieved by the Order of October 30, 1964, of the Bankruptcy Court herein, filed a Petition for Review.

On review to the District Court, the findings of fact and conclusions of law of the Honorable Norman W. Neukom were affirmed and adopted by the Honorable Harry C. Westover, Judge of the District Court.

II.

SUMMARY OF ARGUMENT

The Appellant's opening brief (pp. 2 & 3) and Appellee's Statement of the Case, hereinabove, demonstrate that there are no disputes as to the facts of the case at bar. The Application of the Trustee was to set aside the lien obtained by the attachment where the creditor obtained no judgment and consequently there was no subsequent execution. However, appellant's statement of questions involved on Appeal (App. Br. p. 3) indicate two questions for this Court to consider, whereas the Appellee's contention is that this Court should consider only the following:

Is the Trustee in Bankruptcy vested with title to funds on which a creditor has obtained a writ of attachment over eleven months prior to bankruptcy, but where said creditor has obtained no judgment prior to the filing of the petition in bankruptcy?

It is the contention of the Trustee that the attachment lien obtained by said creditor on the personal property of the Bankrupt vested in the Trustee on November 18, 1963. The mere attachment of said personal property of the bankrupt by said creditor did not constitute a transfer and that title to said personal property remained in the debtor and bankrupt up to the date of bankruptcy, when said funds vested in the Trustee by operation of law.

III.

ARGUMENT WITH POINTS AND AUTHORITIES

A. An Attachment of Personal Property under the Laws of California Does Not Constitute a Transfer to Attaching Creditor.

Attachment in California is not a remedy but is merely ancillary to the ultimate goal, viz., the recovery of a judgment.

Vol. 1, Witkin's California Procedure, p. 888.

It is contingent and uncertain in its terms being dependent upon an outcome of the proceedings favorable to the plaintiff. It does not affect the title of the debtor to the property.

6 Cal. Jur. 2d, p. 338.

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any

judgment that may be recovered, unless the defendant gives security to pay such judgment, . . ."

California Code of Civil Procedure, Section 537.

The answer to the issue at bar hinges on the characteristics of an attachment under the laws of the State of California.

Erie Railroad Co. v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188.

In *Ward* v. *Commissioner of Internal Revenue,* 224 F. 2d 547, which arose in this circuit in 1955, the court, consisting of the Honorable Richard H. Chambers, the Honorable Albert Lee Stephens and the Honorable Leon J. Yankwich, in discussing the law in California as to attachments, stated at page 551:

> "Under California law an attachment is an auxiliary proceeding . . . the attachment is merely a sequestration of the debtor's funds to abide the judgment. They will remain the property of the debtor and title to them passes to the attaching creditor *only* after a judgment in his favor has been entered in which case the lien of the attachment is merged in the judgment." (Emphasis added).

If title to the funds passes only after a judgment, the argument of the Appellant that the Bankruptcy Act exempts from the reach of a Trustee any attachment perfected over four months before the filing of a Petition in Bankruptcy is a fiction not substantiated by law or logic.

> "The Trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property

> which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered:"
>
> *Section 70 (a) (5) Bankruptcy Act (11 U.S.C.A. Sec. 110).*

"Transfer" is defined in Section 1039 of the Civil Code of the State of California to be ". . . an act of the parties, or of law, by which the title to the property is conveyed from one living person to another."

It would therefore appear that the word "transfer" as used in the Bankruptcy Act is interpreted under the laws of California and in view of the above section of the Civil Code of the State of California quite apparently title to the funds has not passed to the appellant by virtue of the writ of attachment. It would also appear that not even possession of the funds attached has passed to the creditor-appellant under the writ of attachment.

In *United States* v. *Security Trust and Savings Bank,* 340 U.S. 47, 95 L. Ed. 53, the question presented was whether a tax lien of the United States was prior in right to an attachment lien where the Federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment. In determining and interpreting the law in California as to the status of the attachment, the Supreme Court of the United States stated at page 50:

> ". . . if the State court itself described the lien as inchoate, this classification is practically conclusive. . . . The Supreme Court of California has so described the attachment lien in the case of *Puisseur* v. *Yar-*

> *brough,* 29 Cal. 2d 409, 412, 175 P.2d 830, 831, by stating that the attaching creditor obtains only a potential right or contingent lien . . . Examination of the California statute shows that the above is an apt description. The attachment lien gives the attaching creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment from ever becoming perfected by a judgment awarded and recorded. *Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect the lien exists.*" (Emphasis added)

Rialto Publishing Company v. *Bass,* 325 F.2d 527, which case was decided in this Circuit in 1963, held that each appellant's asserted attachment lien, by the initial California court attachment alone, and without subsequent court judgment thereon, became only and no more than "a potential right or a contingent lien."

It is entirely possible that the law in states other than California give much more effect to an attachment lien than does the law in California. The effect, however, of the use of attachments in California must be determined by California law.

> *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188.

B. The Order of the Referee Is Not Contrary to Metcalf v. Barker.

The Appellant relies on the case of *Metcalf* v. *Barker,* 187 U.S. 165 (1902) as being decisive of the issues involved herein.

The facts of that case show that Metcalf Brothers obtained confessions of JUDGMENT on October 22, 1896, in the Superior Court of the State of New York against Lesser

Brothers, a co-partnership. Executions were issued and returned unsatisfied at that time.

On December 17, 1896, Metcalf Brothers commenced a Judgment Creditors' action in the Supreme Court of New York and thereupon the creditors of the partnership brought the action to avoid the transfers of the co-partnership so executed on.

It is urgent and indispensible to note that Metcalf Brothers had obtained a judgment at the outset. Their attachment was predicated on said judgment. If the facts of the case at bar were identical to the Metcalf case, there is little doubt that the lien so obtained by the judgment would be choate and the trustee could not prevail.

However, in the instant case, there is no JUDGMENT. There is merely an action filed and an attachment lien filed on personal property of the bankrupt. The attachment lien is merely "inchoate" as defined in the *Rialto Publishing Company* v. *Bass, supra,* and upon the filing of a petition in bankruptcy, title to said property so attached passes to the Trustee in Bankruptcy by operation of law.

C. The Trustee Does Not Necessarily Take the Property Subject to All Valid Claims, Liens and Equities.

In the Matter of Monticello Veneer Co., (D.C., Miss.) 22 Am. B. R. (N.S.) 249, 2 F. Supp. 27, where it was said:

> "Because the Bankruptcy Act measures the extraordinary rights of the Trustee by the sum of the rights of the bankrupt, of creditors, and of other parties dealing with him, it follows that the trustee does not always occupy merely the status of the bankrupt but frequently may get a better title than the bankrupt had, or, in some cases, get title when the bankrupt had none."

The Trustee takes such property not as a bona fide purchaser but in the dual role of a successor to the title of the bankrupt himself and of a creditor with a lien acquired through legal or equitable proceedings. Moreover, certain transfers, including certain liens, are voidable by the trustee under positive provisions of the Bankruptcy Act.

4 Collier on Bankruptcy, Section 70.04, p. 958.

D. Section 60 of the Bankruptcy Act (11 U.S.C.A. §96) Which Validates Inchoate Attachment Liens Within Four Months Prior to Bankruptcy Does Not Apply.

The Appellant seeks to invoke Section 60 of the Bankruptcy Act to the case at bar. Appellee contends that due to the fact that no judgment or execution on a judgment has been obtained by the creditor herein, Section 60 of the Bankruptcy Act cannot and should not be applied to the situation in the case at bar.

There has been no transfer of the funds under attachment from the debtor to the creditor prior to the filing of the Petition in Bankruptcy.

IV.

CONCLUSION AND PRAYER

An attachment lien without benefit of judgment and execution prior to a petition in bankruptcy creates a mere contingency and does not constitute a transfer of the bankrupt's property. The *Rialto, Puissegur, Ward* and other cases cited by Appellee herein show the holding of various courts, including this Circuit Court, on application of facts hereinabove stated.

Wherefore, your appellee submits that the decision of the Honorable District Judge granting the Restraining Order be sustained.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EARLE HAGEN.